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ALEXANDER L. STEVAS,  
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No. 82-1879

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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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JERRY DEAN ROUSSEAU, PETITIONER

v.

CRISPUS NIX, COMMANDANT, U.S.D.B.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether petitioner is entitled to habeas corpus relief from his court martial conviction for a murder committed in Morocco on the ground that the American Ambassador, because of a diplomatic dispute, prohibited defense counsel from contacting non-Embassy personnel to investigate a possible alibi defense — even though petitioner subsequently admitted to defense counsel that the alibi was not true, voluntarily pleaded guilty and confessed to the crime, and has not shown that an investigation by counsel would have been fruitful in any event.

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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 2a-6a) is unreported. The opinion of the district court (Pet. App. 8a-12a) dismissing the habeas corpus petition is also unreported.

## **JURISDICTION**

The judgment of the court of appeals (Pet. App. 1a) was entered on March 3, 1983. The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Pursuant to a plea of guilty, petitioner, a member of the United States Marine Corps, was convicted by a general court martial convened by the Commanding General, Marine Corps Development and Education Command, Quantico, Virginia, of unpremeditated murder, in violation

of Article 118(2) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(2). The military judge sentenced petitioner to life imprisonment. The sentence was reduced to 55 years' imprisonment by the convening authority as part of a pretrial agreement that also included dismissal of a charge of premeditated murder in violation of Article 118(1), UCMJ (10 U.S.C. 918(1)) and rape, in violation of Article 120, UCMJ (10 U.S.C. 920) (Pet. App. 8a-9a). The sentence also included a dishonorable discharge, forfeiture of pay and allowances, and reduction to the lowest enlisted grade (Pet. App. 9a). The United States Navy Court of Review affirmed, and the Court of Military Appeals denied petitions for discretionary review. 9 M.J. 271 (1980); 10 M.J. 281 (1981). Thereafter, the United States District Court for the District of Kansas dismissed a petition for a writ of habeas corpus under 28 U.S.C. 2241 (Pet. App. 8a-12a), and the court of appeals affirmed (Pet. App. 2a-6a).

1. The charge upon which petitioner was convicted resulted from the murder of Dorothy Layton, an American schoolteacher, in her apartment in Rabat, Morocco, during the early morning of July 3, 1978. Following the slaying, petitioner, a Marine guard stationed at the American Embassy in Rabat, admitted to being in Layton's company between 1:30 and 2:15 a.m. on that date and to having consensual intercourse with her. Petitioner initially denied committing the murder, although his bloodstained clothing was left in the apartment. Exh. D to Answer to Pet. for Writ of Habeas Corpus at 5, 6. Petitioner instead maintained that after leaving the victim's apartment to obtain some wine from the trunk of her automobile, he was approached by two men who offered to take him home because he appeared intoxicated. He further maintained that after he rode a long distance and fell asleep, he awoke alongside the road; he explained that he then obtained a ride from a

Moroccan truck driver who took him to a motel on the outskirts of Agadir, Morocco, an eight-hour drive from Rabat (Pet. App. 15a-16a). An affidavit of defense counsel filed in district court in these habeas corpus proceedings states that petitioner initially told counsel an essentially identical story. Answer Exh. D, *supra*.

Defense counsel went to Morocco for a one-week period from July 5 to July 12, 1978. There counsel interviewed petitioner and sought assistance from the United States Embassy in Rabat in locating and interviewing the Moroccan truck driver and a motel clerk petitioner had mentioned. However, because of a jurisdictional dispute then extant between American and Moroccan authorities with respect to who was going to try petitioner for the murder, the American Ambassador ordered counsel not to interview individuals outside the Embassy community (Pet. 2; App. Exh. 29, 31; R. 1037, 1041).<sup>1</sup> Petitioner subsequently was transferred to Quantico Marine Corps Base where, after an investigation conducted pursuant to Article 32, UCMJ (10 U.S.C. 832), the convening authority referred murder and rape charges to a general-court martial (App. Exh. 31).

2. Prior to trial, petitioner's attorneys moved to be permitted to go to Morocco to investigate his asserted alibi. Although the motion was denied, on August 30, 1978, the military judge directed officials of the Naval Investigative Service and a military attorney in Morocco to assist in the investigation (R. 213, 556-560, 563-564). Petitioner has not contended that the investigation in Morocco on the latter occasion was impeded by the Embassy. On September 21, 1978, the military judge inquired whether the defense had sufficient cooperation from the attorney and the Naval Investigative Service "with regard to the matters that you

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<sup>1</sup>"R." refers to the three-volume record of trial.

required to or requested to be investigated at the scene of the crime." Petitioner's counsel responded: "Yes, your Honor" (R. 712).<sup>2</sup>

According to the affidavit of defense counsel, petitioner admitted to his attorney on September 15, 1978, that he had committed the murder and that his alibi was not true. He also told them that he wished to plead guilty in exchange for an agreement limiting the duration of his sentence (Answer Exh. D, *supra*, at 5-7). Petitioner then pleaded guilty, admitting that he had killed Layton and giving the military judge a detailed account of the circumstances of the murder (R. 721-728).

On appeal to the United States Navy Court of Military Review, petitioner argued that his Sixth Amendment right to the assistance of counsel was violated on several occasions, including when the American Ambassador ordered his attorneys not to interview Moroccan nationals in July 1978 (R. 116-118), and that counsel had engaged in misconduct by pressuring him to plead guilty (R. 119-123). The Navy Court of Military Review affirmed petitioner's conviction (R. 80-81), concluding that petitioner had voluntarily pleaded guilty. The court did not specifically address the matter of the Ambassador's order (Pet. App. 4a; R. 80-81).

3. After exhaustion of his appellate rights under the UCMJ, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. The district court concluded that petitioner had received effective assistance of counsel (Pet. App. 12a). In addition, relying upon *Menna v. New York*, 423 U.S. 61 (1975), and *Tollett v. Henderson*, 411 U.S. 258 (1973), the

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<sup>2</sup>Counsel stated in his affidavit that if the case had gone to trial he would not have been satisfied with the assistance he received in Morocco, but that the issue became moot when petitioner admitted the murder. Answer Exh. D, *supra*, at 3.



court concluded that by pleading guilty petitioner had foregone his opportunity to litigate further his claim regarding the Ambassador's order (Pet. App. 11a).

The court of appeals affirmed. That court likewise rejected petitioner's claim that the assistance his trial counsel provided him in deciding whether to plead guilty was inadequate. Relying upon *Burns v. Wilson*, 346 U.S. 137, 142 (1953), it reasoned that this fact-bound question received full and fair consideration in the military courts, which concluded that counsel had not acted improperly and that petitioner's plea was voluntarily entered (Pet. App. 4a). The court of appeals also concluded that because "[petitioner] entered a voluntary and intelligent plea of guilty, it was irrelevant whether or not defense counsel was permitted a free hand to investigate the circumstances of the crime" (Pet. App. 5a-6a).

#### ARGUMENT

Petitioner does not seek review of the court of appeals' holding — which was consistent with that of the district court and the Navy Court of Military Review — that his plea of guilty was voluntarily and intelligently made. In this Court, he contends only that he is entitled to habeas corpus relief because of the order by the Ambassador when petitioner's counsel were in Morocco for one week in July 1978 that they not investigate his alibi defense outside of the Embassy community because of the pending jurisdictional dispute with the Moroccan government. The courts below properly rejected this claim.

A guilty plea "represents a break in the chain of events which ha[d] preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). As this Court explained in *Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975):



[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.

Here, petitioner's counseled plea likewise constituted a reliable admission of guilt that removed the issue of factual guilt from the case. The reliability of his admission is reinforced by the affidavit of defense counsel, which states that petitioner acknowledged to counsel that his earlier alibi story was untrue and that he had committed the murder. Petitioner's plea, therefore, renders irrelevant the issue of the Ambassador's order preventing his attorneys from interviewing witnesses to substantiate an alibi defense that was inconsistent with his subsequent admission of guilt.

It is true, as petitioner points out, that in some circumstances a plea of guilty does not bar a defendant from contending that counsel was ineffective in failing to investigate certain matters. See Pet. 10, citing *Hawkman v. Parratt*, 661 F.2d 1161, 1168-1169 (8th Cir. 1981), and *Ford v. Parratt*, 638 F.2d 1115, 1118 (8th Cir. 1981). But the theory of these cases is that a plea of guilty may be set aside if counsel's lack of investigation affected the voluntariness and intelligence of the plea because it left the defendant with no other choice. 661 F.2d at 1169; 638 F.2d at 1118. See also *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir. 1983); cf. *McMann v. Richardson*, 397 U.S. 759, 770-771 (1970). Here, however, the courts below and the military courts all found that petitioner's plea was voluntary and intelligent.

In his certiorari petition, petitioner does appear to argue (Pet. 3, 9, 10) that the Ambassador's order "forced" him to plead guilty, perhaps now intending to suggest that his plea was not voluntary and intelligent. But petitioner did not argue in his habeas corpus petition that the Ambassador's order actually caused him to plead guilty or rendered his plea involuntary or unintelligent. He simply contended that the order deprived him of effective assistance of counsel at that particular pretrial stage and that he was entitled to relief on that basis alone. See Habeas Petition at 6; Brief in Support of Petition at 5-8; Traverse at 3-7.<sup>3</sup> Nor does petitioner cite any evidence to support a claim that his plea was not voluntary and intelligent. To the contrary, the record indicates that he chose to plead guilty after he failed to pass a polygraph test arranged by defense counsel in hopes that the charges would be dismissed. Answer Exh. D, *supra*, at 4-6.

Nor is there any basis for believing that the Ambassador's order had such an effect on petitioner's decision to plead guilty. That order did not foreclose counsel from assessing the weakness of the alibi defense and providing informed advice to petitioner with respect to whether the more prudent course would be to enter a plea of guilty in exchange for a limitation on the sentence. Moreover, as we have noted, the military judge arranged for an investigation to be conducted by an associate attorney and personnel of the Office of Naval Investigations in Morocco prior to entry of the plea, and petitioner has not shown that this opportunity for investigation was inadequate.

Even without interviewing the alleged alibi witnesses, however, the defense attorneys, after considering the evidence available, including petitioner's statements to investigative authorities and the bloodstained clothing in the

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<sup>3</sup>Petitioner's arguments to the Navy Court of Military Review were to the same effect. See R. 116-119.

victim's apartment, had concluded that "the government's circumstantial case was strong" (Answer Exh. D, *supra*, at 6). In addition, during the guilty plea inquiry, petitioner stated that he had consulted fully with his two defense counsel and received the benefit of their advice; that he was satisfied that their advice to plead guilty was in his best interest; and that he was satisfied with them (R. 731). On the present record, then, there is no basis for concluding that the Ambassador's order affected the validity of petitioner's guilty plea.

Finally, as we explain in our brief (at 18-26) in *Strickland v. Washington*, No. 82-1554, a defendant who asserts that his conviction should be set aside because of counsel's alleged ineffectiveness in failing to investigate must demonstrate prejudice by showing that the investigation would have produced evidence that probably would have altered the outcome of the trial.<sup>4</sup> A fortiori, in this case, in which petitioner previously admitted that the alibi was untrue and that he committed the crime, petitioner must make a substantial showing that favorable evidence would have been produced. But petitioner has not pointed to *any* evidence that would have been uncovered and supported an alibi defense, much less shown that any such evidence probably would have affected the outcome of the trial if he had not pleaded guilty. Indeed, there is no indication even now that petitioner has made any effort to substantiate his alibi defense in Morocco. He accordingly is not entitled to relief for this reason as well.<sup>5</sup>

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<sup>4</sup>We have furnished counsel for petitioner with a copy of our brief in *Strickland v. Washington*.

<sup>5</sup>Petitioner also devotes several pages of his petition (Pet. 6-8) to an issue that is not before this Court. He contends that the court of appeals erred in not independently assessing his claim that counsel was ineffective in other respects in connection with the plea of guilty, on the ground

**CONCLUSION**

The petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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that that claim was fully and fairly considered by the military courts. See *Burns v. Wilson*, 346 U.S. 137 (1953). The court of appeals relied on that doctrine, however, only in connection with that aspect of its decision of which petitioner has not sought review. The *Burns* rationale played no part in the court's consideration of the issue of the Ambassador's order. See Pet. App. 3a-6a.